“Early Bird” Session

SO CLOSE, YET SO FAR

THE EMPLOYMENT LAWS OF CANADA AND MEXICO

John Illingworth (Moderator) – Ogletree Deakins (Toronto)

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Several changes in labour and employment law have recently been implemented in several Canadian provinces. Below is a summary of the key changes to provincial legislation in Ontario, Alberta, British Columbia, and Quebec that will have an effect on both unionized and non-unionized workplaces. All changes listed below went into effect on January 1, 2019, except changes to the Ontario Labour Relations Act, 1995 (OLRA), which took effect on November 21, 2018.

### Ontario

**Changes applicable to all workplaces**

| **Minimum wage freeze** | The minimum wage will remain at $14.00 per hour. The increase to $15.00 per hour that was supposed to come into force on January 1, 2019, has been repealed. Further increases, beginning in 2020, will be tied to inflation. |
| **Holiday pay** | The holiday pay rate will be based on the total amount of regular wages earned and vacation pay payable to the employee in the four workweeks before the workweek in which the public holiday occurs, divided by 20. |
| Scheduling provisions | The following scheduling provisions, which were supposed to come into effect under Bill 148, have been repealed:

1. The employee’s right to request changes to his or her schedule or work location.
2. Three hours’ pay for being on call if the employee is available but not called in to work.
3. The right to refuse to work on a day the employee is not scheduled to work, if given less than 96 hours’ notice.
4. Three hours’ pay for having a scheduled shift cancelled within 48 hours.

The following modified scheduling rule took effect January 1, 2019: where an employee who regularly works more than three hours a day is required to come into work but works less than three hours, despite being available to work longer, the employee will be paid wages for three hours.

The entitlement is the greater of these two amounts:

5. three hours of pay at the employee’s regular rate; or
6. the sum of the amount that the employee earned while working, plus the remaining time calculated at the employee’s regular rate.

The rule will not apply where the employer is unable to provide work due to causes beyond the employer’s control, such as fire, lightning, power failure, inclement weather, or other similar circumstances that result in the stoppage of work.

| Leaves of absence | The requirement to offer employees 10 days of personal emergency leave has been eliminated. Effective January 1, 2019, employees will receive a total of eight unpaid days of leave, which would be distributed as follows:

7. three days per year for personal illness;
8. three days per year for family responsibilities (illness or other urgent matters concerning a spouse or a child); and
9. two days per year for bereavement leave.

Employers are once again permitted to require a doctor’s note as evidence for entitlement to sick leave.

Similar leaves of absences taken pursuant to an employment contract would be deemed as leave under the Employment Standards Act, 2000 (ESA).
### Equal pay for equal work

The requirement of equal pay for equal work on the basis of employment status (i.e., part time or casual) has been repealed. Unequal pay for equal work on the basis of sex remains prohibited.

### Employee classification

If there is a dispute as to whether a worker is an employee or an independent contractor, the employer no longer has to prove that an individual is not an employee (the "reverse onus" introduced by Bill 348 has been repealed). The general prohibition against employee misclassification remains.

### Pay Transparency Act, 2018

The Pay Transparency Act, 2018 is postponed indefinitely at this time, pending further review.

### Canada Pension Plan

**Contribution rate:**

1. Between 2019 and 2023, the contribution rate for employees will gradually increase by one percentage point (from 4.95 percent to 5.95 percent) on earnings between $3,500 and the original earnings limit. Employers will pay the same increase as their employees.

2. In 2019, the contribution rate is 5.1 percent of eligible earnings (up to $57,400 in earnings). In 2020, the contribution rate will be 5.25 percent.

### Changes applicable to unionized workplaces

The changes in this section came into force on November 21, 2018 (the date Bill 47, Making Ontario Open for Business Act, 2018, received Royal Assent).

<table>
<thead>
<tr>
<th>Employee lists</th>
<th>The provision allowing a union to request an employee contact list if the union could establish the support of 20 percent of employees in the bargaining unit has been repealed.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Remedial certification</td>
<td>The provisions requiring the Ontario Labour Relations Board (OLRB) to order remedial certification if the employer contravened the CLRA and such a contravention resulted in the union not being able to demonstrate 40 percent support have been repealed. The OLRB will once again have the discretion to either certify or order a vote.</td>
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<tr>
<td>First agreement arbitration</td>
<td>The provisions allowing for first agreement mediation or mediation/arbitration in any circumstance have been repealed. The OLRB will impose first agreement arbitration upon application and reasonable justification for failure to make reasonable efforts to agree.</td>
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<tr>
<td>Alternate trade union certification process</td>
<td>The provisions providing for an alternate trade union certification process in the building services industry, the home care and community services industry, and the temporary help agency industry have been repealed.</td>
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<td><strong>Review of bargaining units</strong></td>
<td>The OLRB will no longer be able to review the structure of newly certified bargaining units prior to entering a collective agreement. The OLRB can review the structure of a bargaining unit only upon application requesting review and if the OLRB is satisfied that the existing bargaining unit is no longer appropriate for collective bargaining.</td>
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<td><strong>Employee reinstatement following strike</strong></td>
<td>Reinstatement of an employee after a strike is possible only if the union makes an application for reinstatement within six months following the commencement of the strike.</td>
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<tr>
<td><strong>Communications and notices</strong></td>
<td>For any proceedings under the Act, all communications and notices will be sent via mail, courier, fax, email, or any other method that may be prescribed.</td>
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</tbody>
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| **Maximum fines** | Maximum fines for offences under the Act have been restored to their previous amounts:  
- $2,000 for individuals; and  
- $25,000 for organizations. |
Compressed workweek

An employer’s ability to implement compressed workweeks, in which employees could work fewer work days in the work week but more than eight hours per day without working overtime, has been eliminated.

Compressed workweek arrangements in non-unionized workplaces entered into before January 1, 2018, became invalid on January 1, 2019.

Compressed workweek arrangements entered into through a collective agreement will remain valid until the day a new collective agreement is entered into.

Employers must now obtain employee consent to enter an averaging agreement. Averaging agreements allow employers to schedule an employee to work more hours per day without incurring overtime by allowing the employer to average an employee’s hours of work over a period of a few weeks. Scheduled daily hours cannot exceed 12 hours per day.

There are two types of averaging agreements:

1. Hours of work averaging agreement (applicable to groups of employees or individual employees): up to 12 weeks
2. Flexible averaging agreement (applicable to individual employees only): up to two weeks

Extending the hours of work averaging agreement beyond the 12-week maximum requires a variance from the Director of Employment Standards.

Extending the averaging period of a flexible averaging agreement is prohibited.

Overtime is calculated based on the greater number of hours worked in excess of:

1. Eight hours a day (if scheduled for less than eight hours) or daily scheduled hours (if eight or more hours were scheduled); or
2. 44 hours a week (over a one-week averaging period) or an average of 44 hours a week (over a multi-week averaging period).

British Columbia

Employer health tax

A new payroll tax has taken effect. The tax is meant to offset the loss in revenue from medical service plan premiums, which are being phased out. The tax will apply to companies with payrolls over $500,000, and the tax percentage will increase for every $250,000 increment in revenue above $500,000.
In 2018, the British Columbia government announced major changes to the Labour Relations Code and the ESA will be implemented in 2019. A committee has released some recommendations for amendments, and the government is expected to introduce new bills reflecting some of these recommendations in early 2019.

**Quebec**

<table>
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<tr>
<th>Annual vacation</th>
<th>Workers are entitled to three weeks' paid vacation after three years of working for the same employer, instead of five years.</th>
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<tbody>
<tr>
<td>Psychological harassment</td>
<td>All employers are obligated to implement a policy to prevent psychological harassment (which includes sexual harassment) and a method for dealing with complaints.</td>
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<td>The limitation period for filing a harassment complaint has been increased to two years.</td>
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<td>Leaves of absence</td>
<td>The first two days of absence related to family, bereavement, paternity, sickness, organ donation, accident, or domestic violence leave will be paid.</td>
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<td>Domestic violence has been added to the list of leaves of absence entitling an employee to 26 weeks of unpaid leave.</td>
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<td>Right to refuse work</td>
<td>Employees now have the right to refuse to work for more than two hours (instead of four hours) beyond their regular hours in a 24-hour period.</td>
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<tr>
<td>Pay equality and employment status</td>
<td>Employers are prohibited from remunerating an employee at a lower rate than that granted to another employee who performs the same tasks, if the discrepancy is based on employment status.</td>
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As a result of July's presidential election, Andrés Manuel López Obrador became the new president of Mexico, winning by a wide margin over his competitors. He took office on December 1, 2018, for a six-year term extending from 2018-2024. New members of the Congress of the Union, which, for the most part, integrates members of López Obrador's political party, MORENA, took office on August 29, 2018, and started working on September 01 of the same year.

As a result, President López Obrador has significant support in the legislature (Congress and Senate); therefore, all new laws and amendments proposed during López Obrador’s presidential campaign will almost certainly pass on a fast track mode.

With regard to labor and employment issues, President López Obrador’s speeches during his presidential election campaign focused on improving field workers’ (for example, those who work on farms, crop fields, etc), along the border (maquilas) and manufacturing workers’ standard of living, given that such workers are part of a vulnerable group that historically has not received attention and support. His campaign speeches also implied that his government will focus on providing a “dignified hire/job” to these workers pursuant to the Mexican Federal Labor Law and giving them access to fair wages, healthcare, and an improved standard of living. (Observers are expecting an amendment to the Mexican Federal Labor Law, following up an amendment to the Constitution dated Feb 28, 2017 and ILO Convention No 98).

On September 20, 2018, members of the Senate unanimously ratified International Labour Organization (ILO) Convention No. 98, which grants the right to organize and to bargain collectively, rights that have been already adopted in the Mexican Constitution.

On November 30, 2018, the United States, Mexico, and Canada signed the United States–Mexico–Canada Agreement (USMCA). The USMCA will replace the North American Free Trade Agreement (NAFTA), which governs trade in North America. The USMCA must be ratified by legislative bodies within these governments before it can take effect. Chapter 23 on labor and Annex 23-A on collective bargaining represent the first time these topics were included in a major trade agreement.

Following President López Obrador’s campaign promises, the Mexican National Commission on Minimum Wages (Comisión Nacional de los Salarios Mínimos, or CONASAMI) issued a resolution decreeing an increase in the Daily General Minimum Wage (DGMW) for Mexico. Furthermore, CONASAMI established a different and higher minimum wage for the states and cities along Mexico’s northern border in order to promote work in such areas and avoid the draining of the labor pool, especially into the United States and Canada.
CONASAMI approved a 3.62% percent increase, effective January 2019, leaving a final DGMW of $302.68 MXP (which is approximately $5 USD per day). Moreover, CONASAMI established a special DGMW for states and cities along Mexico’s northern border; such special DGMW rises to $376.72 MXP.

The aforementioned increase is awaiting publication in the Official Gazette of the Federation (Diario Oficial de la Federación).

The 3.62 percent increase may serve as a general guideline for revising scaled wages in collective bargaining agreements applicable to Mexican companies as well as for benefits that are scaled to the minimum wage increase; however, employers may want to analyze each particular case on an independent basis.

The Mexico City office of Ogletree Deakins will continue to monitor and report on developments in the labor and employment laws of Mexico as they occur.
So Close, Yet So Far: The Employment Laws of Canada and Mexico

Presenters
Hugh A. Christie (Toronto), Pietro Straulino-Rodriguez (Mexico City), and Lucie Guimond (Montreal)

Moderator
John Illingworth (Toronto)

Agenda
Key Principles – Canadian Law

- Jurisdiction
  - Federal vs. Provincial
  - *Canada Labour Code* only applies to federal undertakings
  - Provincial Law governs:
    - Employment
    - Labour
    - Health and Safety
    - Workers’ Compensation
    - Human Rights and Accessibility

Key Principles – Canadian Law

- Employment Law
  - Is not “at-will”
  - Non-union employees governed by common law and employment standards legislation
  - Employment standards are minimum rights and entitlements
  - Employment contracts are critical
  - Reasonable notice at common law
Key Principles – Canadian Law

- Labour Relations Law
  - Labour law is generally provincially regulated
  - Campaigns are short – 5-7 days
  - Rand formula
  - Reasonable expectation of privacy
  - Can’t contract out of minimum employment standards

Key Principles – Canadian Law

- Human Rights
  - Called “quasi-constitutional” – generally trumps all but safety
  - Alcohol and drug addictions are “disabilities”
  - No mandatory retirement – age over 18 is a protected ground
  - Accommodation to the point of undue hardship
    - Cost
    - Safety
Key Principles – Canadian Law

- Occupational Health and Safety
  - Quasi-criminal
  - Violations are prosecuted
  - Maximum fines for corporations are in millions
  - Supervisors, owners, and directors can go to prison
  - Violence and harassment in workplace are OHS issues as well as human rights and criminal

Recent Developments in Canada

- Legalization of marijuana
- Significant minimum wage increases
- Expansion of protection for workers from workplace harassment and bullying
- Greater pigeon-holing of statutory leaves (making a general PTO more difficult to use)
- Continuing inability of regulators to come to grips with what work IS (dealing with connectivity and the gig economy)
Key Principles – Mexican Law

• Jurisdiction
  – Mexico is a Federal Republic, containing 32 states
  – Mexican Constitution grants the foundations principles of Labor Law
  – As consequence of the previous, a Mexican Federal Labor Law (FLL) was drafted. The “employment stability” principle was regulated.
  – Labor Boards were created by the referred FLL. There are two jurisdictions – federal and local. Said jurisdiction relies on the employer’s activity/industry.

Key Principles – Mexican Law

• Individual Employment Relations
  – “At-will” employment is not ruled nor recognized by Mexican law
  – Unlike U.S., FLL rules the importance of having a written document whereby employment conditions are agreed. (“Individual Employment Agreement” – mandatory formalities have to be met.)
Key Principles – Mexican Law

- Employer always has the burden of proof and interpretation most favorable to the employee will prevail (in litigation)
- Modification in detriment of employment benefits are illegal
- Termination is possible through the ruled scenarios, as well as if any mandatory justified cause arises (both parties)
- Moreover, termination without justified cause will automatically trigger severance (seniority increases costs)

Key Principles – Mexican Law

- Collective relations:
  - Standard: Unions in Mexico are classified as red (conflictive), white (protection), and active (representation from the employees exist)
  - CBA has to be reviewed yearly (salary) and bi-yearly (terms and conditions/benefits) on its content
  - Possibility to have a CBA filed, but it would not apply to the workplace
  - Always execute a CBA (locker example)
Key Principles – Mexican Law

- **Human Rights**
  - Employment benefits, once granted *acquired rights theory*, cannot be diminished nor eliminated. Otherwise, employee could file constructive discharge lawsuit and full severance payment is triggered.
  - Employment Stability Principle – ruled by Constitution and FLL. Principal cause of severance payment.
  - “Equality” principle: same activities and position = same salary. Discrimination is lately a trendy matter in litigation (mother employees and women discrimination).
  - Data privacy

Key Principles – Mexican Law

- **Social Security**
  - Instituto Mexicano del Seguro Social (IMSS) – social security authority *medical, maternity, pension*
  - All employers must be enrolled and enroll its employees, according to activities and salaries
  - Contribution based on employee’s consolidated wage. Contributions are made by employers, employees, and Mexican Government.
  - Maternity and sickness/incapacity leaves are managed and paid *(in a percentage)* by the IMSS
Recent Developments in Mexico

- Two geographical zones (north zone cities and rest of remaining cities) and two minimum wages (MXN $102.68 = $5.40 US and MXN $176.72 = $9.3 US)

- Marijuana in Mexico: “the prohibition for recreational use is unconstitutional” – still awaiting federal regulation and yet its use will be prohibited in the workplace

Recent Developments in Mexico

- New amendment for the Mexican Federal Labor Law (not official yet? – wait until till May 1)
  1. Labor Boards will be abolished and in their place, new labor courts will be incorporated
  2. A new “Labor Organization” will be incorporated. Principle functions:
     - Negotiation between parties (pre-trial requirement)
     - Enrollment of unions
     - CBA filings
  3. New requirements will need to be followed in order to have a CBA registered
  4. Different rumors with regards to outsourcing, yet anything official...
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